Cite as 2009 Ark. 278 (unpublished)

ARKANSAS SUPREME COURT

No. CR 08-475

WILSON McCRACKIN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered May 14, 2009

PRO SE APPEAL FROM THE CIRCUIT COURT OF ASHLEY COUNTY, CR 2005-156, HON. DON GLOVER, JUDGE

AFFIRMED.

PER CURIAM

In 2006, a jury found appellant Wilson McCrackin guilty of aggravated robbery and theft of property and sentenced him to an aggregate term of 324 months' imprisonment. The Arkansas Court of Appeals affirmed. *McCrackin v. State*, CACR 06-995 (Ark. App. Nov. 28, 2007). Appellant timely filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 that was denied. Appellant brings this appeal alleging two points of error by the trial court, both of which are based upon appellant's claims in his petition of ineffective assistance of counsel.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam).

A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.*

Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). A petitioner making a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007). In doing so, the claimant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* As to the second prong of the test, the petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Appellant first contends that the trial court erred in determining that trial counsel was not ineffective, as appellant alleged in his petition, for failure to adequately investigate and present a defense of duress. The trial court found that counsel had presented the defense of duress at trial, in that appellant had testified as to his knowledge of one of his codefendants as a violent felon and his fear of that codefendant. The order denying postconviction relief cited evidence presented at trial supporting a determination that appellant did not act under duress

and found that the jury was not convinced that the affirmative defense was proved.

Appellant asserts on appeal, as in his petition, that trial counsel was deficient because he did not question appellant sufficiently and that counsel could have discovered evidence of appellant's fear of guns and his consumption of marijuana and alcohol. Appellant claims that his fear of guns and intoxication increased his apprehension under the circumstances. The evidence that appellant contends would have been discovered if counsel had questioned him further was not, however, evidence that could have been admitted in support of appellant's defense of duress or that, if admitted, would have been sufficient to raise a reasonable probability that the fact-finder's decision would have been different.

To prove duress, one must show that he was compelled to act by a threat or use of unlawful force that a person of ordinary firmness in the actor's situation would not have resisted. *Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002); *see also* Ark. Code Ann. § 5-2-208 (Repl. 2006). The threat must meet an objective standard and evidence concerning the defendant's mental or emotional condition is irrelevant if it is subjective. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987). Under section 5-2-208(b), the affirmative defense of duress is unavailable if the actor recklessly placed himself or herself in a situation in which it was reasonably foreseeable that the actor would be subjected to the force or threatened force.

The burden was on the appellant to demonstrate that the evidence that he claimed could have been discovered through additional investigation was sufficient to undermine confidence in the outcome of the trial. Considering the requirements necessary to prove the affirmative defense, we cannot say that the trial court clearly erred. The court found that,

because there was evidence that appellant did not act under duress admitted at trial and the jury found that evidence persuasive, appellant had failed to meet his burden. While the potential evidence might have shown that appellant's subjective level of apprehension was greater than that of a person of ordinary firmness, it did not challenge the objective standard imposed by the statute. Even if intoxication could be considered as relevant to appellant's situation, that intoxication was as much evidence that appellant had recklessly placed himself in the situation as it was evidence to support a lower objective standard for the degree of force required.

In appellant's second and last point of error, he alleges the trial court erred in failing to find ineffective assistance because his attorney did not object to what appellant characterizes as misrepresentations by the prosecution during closing arguments. Appellant contends that counsel should have objected to comments by the prosecution that appellant "got his money and he hid it in the console." The trial court found that appellant was not prejudiced by the failure to object because counsel is given leeway to argue every plausible inference which can be drawn from the evidence. The court found that any objection by counsel would have been without merit. On appeal, appellant contends that facts were not presented at trial to support the statements in closing arguments. Appellant further contends that he should not be required to show prejudice because he is pro se.

Counsel is not ineffective for failing to make an argument that is meritless. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). A petitioner carries the burden to prove his allegations for postconviction relief. *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990);

Porter v. State, 264 Ark. 272, 570 S.W.2d 615 (1978) (holding under prior law). Appellant cites no authority or convincing argument as to application of an exception to the general rule in this case. This court will not consider an argument that presents no citation to authority or convincing argument. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002). Pro se litigants are held to the same standards as attorneys. *See Kennedy v. Byers*, 368 Ark. 516, 247 S.W.3d 525 (2007) (per curiam); *Eliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000). Here, appellant was required to demonstrate prejudice from any error; that he filed his petition pro se does not relieve him of that obligation.

Although appellant contends that there was no evidence at trial to support the statement by the prosecution that appellant received his share of the money and hid it in the console, there was evidence introduced that money was found in three different locations in the vehicle appellant was driving at the time of his arrest, including the console. Counsel are free to argue every plausible inference which can be drawn from the testimony. *Jackson v. State*, 368 Ark. 610, 249 S.W.3d 127 (2007). Because the jury could have concluded from the evidence that appellant and his two codefendants had divided the money from the bank robbery and then put the money for each of them into a different hiding place, the prosecution was free to argue that inference. The trial court did not err to find that any objection would have been without merit. Accordingly, we affirm the denial of postconviction relief.

Affirmed.